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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

COLONY INSURANCE COMPANY,

Plaintiff,

v.

RI KY ROOFING & SHEET METAL, LLC, an Oregon limited liability company; and DTL BUILDERS, INC., a Utah corporation,

Defendants.

Civil No.

COMPLAINT FOR DECLARATORY RELIEF

COMES NOW Plaintiff Colony Insurance Company, by and through its attorneys, and for its complaint against Defendants Ri Ky Roofing & Sheet Metal, LLC, and DTL Builders, Inc., alleges and claims as follows:

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I. PARTIES

1. Colony Insurance Company (Colony) is, and was at all times material to this action, a corporation organized under the laws of the state of Virginia. Colony maintains its principal place of business in Richmond, Virginia, and regularly conducts the business of insurance in Oregon.

2. Ri Ky Roofing & Sheet Metal, LLC (Ri Ky) is, and was at all times material to this action, a limited liability company organized under the laws of the state of Oregon. Ri Ky maintains its principal place of business in Oregon City, Oregon, and regularly conducts business in Oregon.

3. DTL Builders, Inc. (DTL) is, and was at all times material to this action, a corporation organized under the laws of the state of Utah. DTL maintains its principal place of business in Riverton, Utah, and regularly conducts business in Oregon.

4. DTL filed counterclaims against Ri Ky in the United States District Court for the District of Oregon, Case Nos. 6:17-cv-01592-JR (lead case) and 6:17-cv-01251 (trailing case) (collectively the Underlying Suit). A copy of DTL's Second Amended Counterclaim in the Underlying Suit is attached hereto as Exhibit A and is incorporated herein by reference for all intents and purposes. As counterclaim plaintiff in the Underlying Suit, DTL may have an interest in the outcome of any insurance coverage action between Colony and Ri Ky.

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II. JURISDICTION AND VENUE

5. This Court has diversity jurisdiction over this action pursuant to 28 U.S.C. § 1332 because the amount in controversy exceeds $75,000, exclusive of interest and costs, and the action is between citizens of different states.

6. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) because Defendant Ri Ky resides in this district, the Underlying Suit is pending in this district, and a substantial part of the events or omissions giving rise to the claims at issue in this action occurred in this district.

III. FACTUAL ALLEGATIONS

7. This is an insurance coverage dispute arising out of Ri Ky's tender of the Underlying Suit to Colony for defense and indemnification.

8. Colony provided commercial general liability insurance coverage to Ri Ky through Colony Insurance Company Policy No. 103 GL 0014293-00 (the Policy), effective between June 1, 2016, and July 1, 2017.

9. DTL alleges claims against Ri Ky and seeks damages in excess of $1,882,254.90 in the Underlying Suit. The Policy, however, does not provide coverage for most or all of the claims, liability, and damages alleged by DTL against Ri Ky in the Underlying Suit.

10. The Policy includes a Commercial General Liability Coverage Form, including a Bodily Injury and Property Damage Liability Insuring Agreement, which provides coverage for sums the insured becomes legally obligated to pay as damages because of "property damage" to which the Policy applies, and further requires Colony to defend the insured against any suit seeking damages to which

the Policy applies, pursuant and subject to all of the terms, conditions, limitations, exceptions, and exclusions set forth in the Policy.

11. The Underlying Suit asserts claims against Ri Ky for breach of contract, breach of contractual covenant of good faith and fair dealing, and negligence. The claims arise out of a subcontract between Ri Ky and DTL for roofing work that Ri Ky performed on a project known as WinCo #143 (the Project). DTL was the general contractor on the Project.

12. On August 11, 2016, DTL entered into contracts with WinCo Foods, LLC (WinCo), to perform demolition, site work, off-site work and building work at the site of WinCo #143, in Albany, Oregon. DTL's work on the Project commenced on August 29, 2016, and DTL was required by contract to achieve substantial completion of the entire Project by May 14, 2017.

13. On August 23, 2016, DTL entered into a subcontract agreement with Ri Ky to install the roof system on the Project. Ri Ky commenced work on the Project on or about January 2, 2017.

14. As of February 19, 2017, DTL had identified as many as forty-four leaks in the roof system on the Project, which DTL attributed to Ri Ky's negligent installation of the wrong roofing materials. On February 28, 2017, DTL issued a 48-hour Notice of Default and Opportunity to Cure to Ri Ky.

15. On or about March 1, 2017, DTL identified and mapped out thirty-three leaks in the roofing still being installed by Ri Ky. DTL issued a Notice of Failure to Cure to Ri Ky on March 3, 2017.

16. On or about March 6, 2017, DTL hired another subcontractor, Frontier Roofing & Construction, LLC (Frontier) to supplement and repair the roofing work performed or being performed by Ri Ky, while Ri Ky continued its work on the installation. Frontier repaired leaks and patched failed areas of the roofing on the Project from March 6, 2017, through March 28, 2017.

17. WinCo engaged Terracon Consultants, Inc. (Terracon), on March 9, 2017, for the purpose of undertaking an investigation of the installation and integrity of the roofing system. Using visual inspection, capacitance scans, and core sampling, Terracon identified the presence of trapped moisture and multiple defects in the installation of the roof system. Terracon ultimately recommended that the roof system be torn off and replaced in its entirety.

18. On March 14, 2017, DTL informed Ri Ky that reach-in coolers that were being stored or installed inside the unfinished building were damaged by water entering the structure through leaks in the roof system. DTL alleged that the damage to the coolers was caused by Ri Ky's negligent installation of the roof system on the Project. DTL informed Ri Ky that Ri Ky would be held accountable for the cost of replacing the reach-in coolers, because water continued to be an issue inside the unfinished building.

19. On March 16, 2017, DTL informed Ri Ky that Ri Ky was being removed from the Project. Ri Ky was instructed to leave the job site, leaving behind Ri Ky's equipment and materials.

20. The manufacturer of the roofing system that Ri Ky was installing on the Project, Versico Roofing Systems (Versico), inspected the roof after Ri Ky was

removed from the Project, and issued a Technical Assistance Report confirming that installation of the roof system was only 85% complete as of March 27, 2017. Ri Ky also reported to Colony that, at the time Ri Ky was removed from the Project and job site, Ri Ky had yet to complete work on a 100' parapet wall and the finish work around skylights in the roof.

21. On March 31, 2017, DTL subcontracted with Progressive Roofing (Progressive) to complete repairs and installation of the roof system on the Project. Based upon Terracon's conclusions and recommendations, Progressive removed and replaced all of the roofing installed by Ri Ky.

22. Versico certified the roof system complete on June 4, 2017. On June 15, 2017, the City of Albany issued a Temporary Certificate of Occupancy to WinCo.

23. The Underlying Suit does not allege that any property damage occurred after WinCo took possession and occupancy of the completed building upon completion of the Project.

24. On or about June 13, 2017, Ri Ky filed suit against DTL and WinCo in the Circuit Court of Oregon for Linn County seeking foreclosure of a mechanics lien, and alleging claims for breach of contract and quantum meruit. Ri Ky's claims were subsequently dismissed in their entirety, with prejudice, by stipulation of the parties in the Underlying Suit.

25. The only claims remaining in the Underlying Suit are DTL's counterclaims against Ri Ky, which allege that Ri Ky breached its subcontract agreement with DTL by

(a) not performing the work required under the subcontract agreement in a timely manner, requiring DTL to incur additional expense and logistical challenges in hiring other contractors to supplement Ri Ky's work;

(b) not completing Ri Ky's work on the Project; and

(c) not performing Ri Ky's work properly or otherwise in a workmanlike manner, even to the extent of causing damage to other property and forcing DTL to replace and otherwise redo the entire roof system at a significant expense.

26. The Underlying Suit further alleges that Ri Ky breached the contractual covenant of good faith and fair dealing by

(a) implementing improper construction methods, including without limitation, failing to install the requisite amount of fasteners for the roofing system's insulation boards and installing many insulation boards upside down despite express instructions on such boards stating which side was to be placed down; and

(b) installing the wrong insulation boards that were not approved by the roofing system's manufacturer, which could have resulted in the manufacturer's invalidating or refusing to issue the requisite warranty for the roof system (had the roof system not needed to be replaced).

27. The Underlying Suit further alleges that Ri Ky had a duty to properly install the Project's roof system and to otherwise keep it from causing damage to

persons or property, and that Ri Ky breached that duty by not properly installing the roof system, resulting in failure of the roof system.

28. In settlement demands issued during the course of the Underlying Suit, DTL alleged six distinct categories of damages sustained by DTL as a result of Ri Ky's alleged breach of contract and negligent installation of the roofing system on the Project. Specifically, DTL alleged damages totaling $1,882,254.90 as follows:

(a) $217,730.12 in payments to Ri Ky for negligent work that had to be replaced;

(b) $31,151.00 in damage to WinCo-supplied equipment caused by Ri Ky's failure to dry-in the Project;

(c) $31,607.48 in direct costs incurred by DTL for cleanup and repair;

(d) $828,425.32 in costs for the assessment, tear-off and replacement of the defective roof installed by Ri Ky;

(e) $45,049.19 in OH&P fees on the prior categories of damages; and

(f) $728,291.79 in Legal/Claim preparation costs.

29. Ri Ky denied all of the claims alleged in the Underlying Suit, and asserted affirmative defenses based upon DTL's alleged breach of the subcontract agreement and comparative fault.

30. Ri Ky tendered the Underlying Suit to its insurer, Colony, for defense and indemnification pursuant to Colony Commercial General Liability Policy No.

103 GL 0014293-00 (the Policy) and Colony Excess Liability Policy No. XS171483 (the Excess Policy).

31. Colony acknowledged Ri Ky's tender, and is defending Ri Ky in the DTL lawsuit pursuant and subject to a full reservation of Colony's rights. Trial is currently scheduled to begin on March 23, 2020.

32. The Policy provides in relevant part as follows:

> **SECTION I – COVERAGES**
> **COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY**
>
> **1. Insuring Agreement**
>
> **a.** We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:
>
> **(1)** The amount we will pay for damages is limited as described in Section **III** – Limits Of Insurance; and
>
> **(2)** Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages **A** or **B** or medical expenses under Coverage **C**.
>
> No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverages **A** and **B**.

b. This insurance applies to "bodily injury" and "property damage" only if:

(1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory";

33. The term "property damage" is expressly defined in the Policy to mean "physical injury to tangible property, including all resulting loss of use of that property [* * *]," or "loss of use of tangible property that is not physically injured."

34. The term "occurrence" is expressly defined in the Policy to mean "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

35. Categories (a) and (c)-(f) set forth in paragraph 28 above, and as sought in the Underlying Suit, do not constitute "property damage" caused by an "occurrence" as those terms are expressly defined in the Policy, and the Policy does not provide coverage for these alleged damages.

36. The Policy further provides in relevant part as follows:

SECTION I – COVERAGES

COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY

* * *

2. Exclusions
This insurance does not apply to:

* * *

b. Contractual Liability

[* * *] "property damage" for which the insured is obligated to pay damages by reason of the assumption of

liability in a contract or agreement. This exclusion does not apply to liability for damages:

* * *

(2) Assumed in a contract or agreement that is an "insured contract", provided the [* * *] "property damage" occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an "insured contract", reasonable attorneys' fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of [* * *] "property damage", provided:

(a) Liability to such a party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and

(b) Such attorneys' fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

* * *

j. Damage To Property

"Property damage" to:

* * *

(4) Personal property in the care, custody or control of the insured;

(5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or

(6) That particular part of any property that must be restored, repaired or replaced because "your work"

was incorrectly performed on it.

* * *

Paragraph **(6)** of this exclusion does not apply to "property damage" included in the "products-completed operations hazard".

k. Damage To Your Product

"Property damage" to "your product" arising out of it or any part of it.

l. Damage To Your Work

"Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard".

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

m. Damage To Impaired Property Or Property Not Physically Injured

"Property damage" to "impaired property" or property that has not been physically injured, arising out of:

(1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or

(2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

37. The Policy expressly defines the following terms and phrases applicable to the exclusions set forth above:

SECTION IV – DEFINITIONS

* * *

8. "Impaired property" means tangible property, other than "your product" or "your work", that cannot be used or is less useful because:

a. It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous; or

b. You have failed to fulfill the terms of a contract or agreement;

if such property can be restored to use by the repair, replacement, adjustment or removal of "your product" or "your work" or your fulfilling the terms of the contract or agreement.

9. "Insured contract" means:

* * *

f. That part of any other contract or agreement pertaining to your business [* * *] under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization, provided the "bodily injury" or "property damage" is caused, in whole or in part, by you or by those acting on your behalf. However, such part of a contract or agreement shall only be considered an "insured contract" to the extent your assumption of the tort liability is permitted by law. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

* * *

16. "Products-completed operations hazard":

a. Includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:

(1) Products that are still in your physical possession; or

(2) Work that has not yet been completed or abandoned. However, "your work" will be deemed completed at the earliest of the following times:

(a) When all of the work called for in your contract has been completed.

(b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.

(c) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.

Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.

* * *

21. "Your product":

a. Means:

(1) Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:

(a) You;

* * *

b. Includes:

(1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your product"; and

(2) The providing or failure to provide warnings or instructions.

* * *

22. "Your work":

a. Means:

(1) Work or operations performed by you or on your behalf; and

(2) Materials, parts or equipment furnished in connection with such work or operations.

b. Includes:

(1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work"; and

(2) The providing of or failure to provide warnings or instructions.

38. The above-quoted provisions of the Policy exclude from coverage the claims and damages alleged in the Underlying Suit. The Policy does not apply to or provide any coverage for the claims, liability, or damages alleged in the Underlying Suit accordingly, and Colony denies that it has any duty to defend or indemnify Defendants for such claims, liability, or damages.

39. Defendants disagree with Colony, and have demanded that Colony defend and indemnify Defendant Ri Ky against the claims, liability, and damages alleged in the Underlying Suit.

40. Colony is currently defending Defendant Ri Ky in the Underlying Suit pursuant and subject to a full reservation of rights. Colony is incurring, and will

continue to incur, substantial costs in defending Defendant Ri Ky in the Underlying Suit.

41. Colony's defense of Defendant Ri Ky under reservation of rights is currently causing, and will continue to cause, irreparable financial harm to Colony in the form of expenses incurred for the defense or indemnification of Defendant Ri Ky against claims, liability, and damages that are not covered under the terms and conditions of the Policy.

IV. CLAIM FOR RELIEF

(Declaratory Judgment)

42. Colony incorporates by reference herein the allegations set forth above in paragraphs 1 through 41.

43. A present and actual controversy exists regarding the respective rights of Colony and Defendants with respect to the Policy, and Colony's obligations, if any, to defend and indemnify Defendants against the Underlying Suit.

44. Colony seeks and is entitled to a declaration of the rights of the parties pursuant to Fed. R. Civ. P. 57 and 28 U.S.C. § 2201(a).

45. Colony seeks a legal determination and declaration that Colony has no duty to defend or indemnify Defendants in relation to the Underlying Suit.

V. PRAYER FOR RELIEF

WHEREFORE, Plaintiff Colony Insurance Company prays for the following relief:

1. Judgment against Defendants and in favor of Plaintiff Colony Insurance Company on all claims for relief stated herein;

2. A declaration that Colony does not have any duty or obligation to defend or indemnify Defendant Ri Ky in relation to the Underlying Suit;

3. An award of Colony's costs and disbursements as permitted by law or equity; and

4. Such other and further relief as the Court deems just and equitable.

DATED: March 20, 2020

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